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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

TIMOTHY A. DEWITT,

Plaintiff and Appellant,

A142444

v.

**(Alameda County
Super. Ct. No. RG12638207)**

DEVRY UNIVERSITY, INC. et al.,

Defendants and Respondents.

_____/

Attorney Timothy A. DeWitt sued several defendants in propria persona for violating the California Anti-Spam Act (Bus. & Prof. Code, § 17529.5).¹ The trial court

¹ Unless noted, all further statutory references are to the Business and Professions Code. Section 17529.5, subdivision (a) provides in relevant part: “It is unlawful for any . . . entity to advertise in a commercial e-mail advertisement . . . sent to a California electronic mail address under any of the following circumstances: . . . [¶] (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information. [¶] (3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.” For an overview of the California Anti-Spam Act, see *Rosolowski v. Guthy-Renker LLC* (2014) 230 Cal.App.4th 1403, 1410-1412 (*Rosolowski*).

Defendants are DeVry University, Inc. (DeVry), University of Phoenix, Inc. (University of Phoenix), DISH Network, LLC (DISH), DirectBuy, Inc. (DirectBuy),

struck portions of DeWitt's first amended complaint, and later granted defendants' motion to compel DeWitt's deposition and for monetary sanctions. The court subsequently granted defendants' summary judgment motion and entered judgment for defendants.

DeWitt appeals in propria persona. He contends the court erred by: (1) striking portions of the first amended complaint; (2) ordering him to pay defendants' attorney fees as a sanction for his discovery misconduct; and (3) granting summary judgment for defendants. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

DeWitt's original complaint alleged two claims based on violations of section 17529.5.² The court sustained defendants' demurrers with leave to amend and DeWitt filed a first amended complaint.

Defendants' Motion to Strike the First Amended Complaint

As relevant here, DeWitt's first amended complaint alleged defendants violated section 17529.5, subdivisions (a)(2) and (a)(3). DeWitt alleged he received a specific number of e-mails advertising defendants' products and services. Paragraphs 17 through 19 alleged defendants were also "jointly and severally responsible and liable" under section 17529.5 for 10,000 to 15,000 additional e-mails *not* advertising their products or services because defendants were members of an "e-mail marketing network[,]" defendants benefitted from their participation in the "network," and the additional e-mails were similar to the e-mails advertising defendants' products and services. The first amended complaint attached several exhibits, including exhibit G, which contained e-mails advertising, among other things, Subway and Red Lobster.

Bosley Medical Group (Bosley), and SimplyInk.com (SimplyInk), collectively, defendants).

² We disregard DeWitt's appellant's appendix because it does not comply with the California Rules of Court (Rules of Court): it is not arranged chronologically and is not paginated. (Rules of Court, rules 8.122(b)(1), 8.124(b) & (d)(1), 8.144(a)(1).) DeWitt's factual recitation does not comply with Rules of Court, rule 8.204(a)(2)(C). We will sanction DeWitt for future violations of the Rules of Court. (See *Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 166-167.)

Defendants moved to strike paragraphs 17 through 19 and exhibit G. They argued: (1) those paragraphs failed to allege a principal-agent relationship, partnership, or joint venture; (2) defendants were not liable under section 17529.5 for e-mails they did not send and that did not advertise their products or services; and (3) the e-mails in exhibit G did not “contain identifying features or characteristics . . . common to the e-mails” advertising defendants’ products and services. DeWitt opposed the motion, repeating the allegations in the first amended complaint but conceding the additional e-mails did not advertise defendants’ products or services.

The court granted defendants’ motions to strike. As the court explained, liability under section 17529.5 “extends to persons and entities who advertise in a commercial email advertisement. That includes only persons and entities who actually transmit the particular email or advertise products in it. Liability under . . . [section] 17529.5 is purely statutory, and cannot be imposed on ‘advertiser members’ of a network or association of email marketers for emails that were neither sent by, nor advertised the products of, those advertiser members based on vague and conclusory allegations of common law master-servant, principal-agent, partnership, and/or associational principles of liability. The allegations that each advertiser-member ‘benefits’ from the ‘network’ is not sufficient to support liability under [section] 17529.5 for each email sent by that network.” The court ordered DeWitt to file a second amended complaint.

Second Amended Complaint and Discovery

The operative second amended complaint (complaint) alleged defendants violated section 17529.5, subdivisions (a)(2) and (a)(3) by promoting their products and services in unsolicited commercial e-mails containing “falsified or misrepresented ‘header’ and misleading ‘subject line’ information[.]”³ Specifically, the complaint alleged DeWitt

³ The “header” of an e-mail is “‘the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message’ (15 U.S.C. § 7702(8)).” (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 340, fn. 5 (*Kleffman*); see also *Rosolowski, supra*, 230 Cal.App.4th at p. 1411, fn. 4.)

received e-mails: (1) with headers failing to identify the “person or entity actually transmitting the e-mail[;]” (2) where the “true identity of the transmitter of the e-mail” was not “verifiable, ascertainable, or traceable” by reference to a “website or other public databases available on the internet; and (3) with subject lines that were misleading because they contained “promotional information” about the advertisers’ products and services, “but the e-mails themselves actually contain no such content at all[.]” Additionally, DeWitt alleged that “a few months after delivery” of the e-mails, the embedded hyperlinks “no longer open[ed],” rendering the information “permanently inaccessible to the recipient[.]”

According to the complaint, DeWitt received between 750 and 790 e-mails, comprised of 225 to 235 e-mails advertising SimplyInk, 245 to 255 e-mails advertising DISH, 130 to 135 e-mails advertising DirectBuy, 75 to 80 e-mails advertising University of Phoenix, 40 to 45 e-mails advertising DeVry, and 35 to 40 e-mails advertising Bosley. DeWitt sought \$750,000 to \$790,000 in damages and declaratory relief. The complaint attached examples of e-mails DeWitt received advertising each defendant’s products or services. The e-mail headers identified defendants: “From: University of Phoenix <universityofphoenix@bigwonderfulclicks.com>” and “DISH Network Authorized Retailer <rad@dontquitonlinemarketing.com>[.]” The subject lines also identified defendants and promoted their products and services: “Start your new career with DeVry” and “More ways to watch, more ways to save DISH Network.” The body of the e-mails identified defendants several times, promoted defendants’ products and services, and provided defendants’ physical addresses.

During discovery, defendants asked DeWitt to provide “available dates for his deposition.” After DeWitt declined to do so, defendants served similar notices setting his deposition. Four days before the scheduled deposition, DeWitt objected to the notices “as violative of both the ‘one’ and ‘seven-hour’ deposition rules” in Code of Civil Procedure sections 2025.610 and 2025.290. Defendants assured DeWitt his deposition would not exceed seven hours, but he did not appear. Defendants moved to compel DeWitt to attend his deposition, and for \$21,827.13 in monetary sanctions based on the

court reporter's appearance fee and defendants' attorney fees and costs in attending DeWitt's deposition and moving to compel. They argued they could not prepare their defense without deposing DeWitt, DeWitt's objections to the deposition notices lacked merit, and DeWitt's failure to appear for his deposition was unjustified and "should be sanctioned."

In opposition, DeWitt claimed the deposition notices were defective and his refusal to appear for his deposition was "substantially justified." He also argued the imposition of sanctions would be unjust and that forcing a self-represented litigant to pay an opposing party's attorney fees as a discovery sanction violated due process principles because self-represented litigants cannot recover attorney fees for discovery sanctions. The court granted the motion and ordered DeWitt to appear for a seven-hour deposition and pay monetary sanctions. It determined DeWitt's failure to appear at his properly noticed deposition was "not substantially justified[.]" and his conduct exhibited "an intent to frustrate and delay Defendants' right to conduct discovery" and caused defendants to "incur unnecessary expenses" for travel costs, court reporter and videographer fees, and attorney fees.

Defendants' Motion for Summary Judgment

Defendants moved for summary judgment. As relevant here, defendants argued: (1) they did not violate section 17529.5, subdivision (a)(2) because they authorized third parties to use their names in e-mail advertisements, and because the e-mails contained truthful information; (2) they did not violate section 17529.5, subdivision (a)(2) because the e-mail headers identified defendants; (3) section 17529.5, subdivision (a)(2) does not require an e-mail header to "disclose the actual sender of the email" and the use of untraceable proxy domain names is not unlawful; (4) they did not violate section 17529.5, subdivision (a)(3) because the e-mail subject lines were not misleading; and (5) the expiration of some embedded hyperlinks did not violate section 17529.5, subdivisions (a)(2) or (a)(3). In support of the motion, defendants offered evidence they authorized third parties to send the e-mails and that DeWitt identified the advertisers in each e-mail by reading the header or subject line.

In opposition, DeWitt argued defendants violated section 17529.5, subdivision (a)(2) because the e-mails did not identify the third party transmitting the e-mails and because the transmitting domain name was not traceable. In response to defendants' separate statements of undisputed material facts, however, DeWitt did *not* dispute: (1) defendants authorized the third parties to send the e-mails; (2) each e-mail identified a defendant in the header or subject line; and (3) he was able to identify the defendant advertised in each e-mail by reading the header or subject line.

The court granted defendants' summary judgment motion. In a thorough written order, the court determined defendants did not violate section 17529.5, subdivision (a)(2) because the e-mails "accurately identified the actual advertiser on whose behalf the email was sent, [] the headers contained truthful information, and [defendants] authorized the third-party advertiser to use the information in the header." The court rejected DeWitt's claim that the absence of a traceable domain name violated section 17529.5 and concluded the e-mails, "which identify the business on whose behalf they are sent, do not violate sec[ti]on 17529.5(a)(2), even if they use a sender domain name that is not readily traceable to the sender using a publicly available online database." The court also determined section 17529.5, subdivision (a)(2) does not require an e-mail header to identify the business authorizing the e-mail, or the entity actually transmitting the e-mail. Finally, the court concluded defendants did not violate section 17529.5, subdivision (a)(3) because the subject lines were "consistent with email advertisements for Defendants' brands, products, or services" and because the expiration of some advertising content in the e-mails "cannot be considered likely to mislead a recipient, acting reasonably under the circumstances. . . ." The court entered judgment for defendants.

DISCUSSION

I.

DeWitt's Challenge to the Order Granting the Motion to Strike Fails

DeWitt contends the court erred by granting defendants' motion to strike portions of the first amended complaint. A party may move to strike "any irrelevant, false, or

improper matter inserted in any pleading[.]” (Code Civ. Proc., § 436, subd. (a).) A motion to strike can be used to attack conclusory or legal allegations in a pleading (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 7:179, p. 7(1)-72), or a portion of a cause of action “substantively defective on the face of the complaint.” (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 (*PH II*).)

We review the order striking portions of the first amended complaint for abuse of discretion. DeWitt has the burden to “establish such abuse.” (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) The order granting the motion to strike is “entitled to a presumption of correctness. [Citation.] This means [DeWitt] bears the burden of affirmatively demonstrating error in the order.” (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 528.) DeWitt has not satisfied this burden. His “argument” is a series of conclusory statements lacking reasoned legal analysis and supporting authority. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287; *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214.)

DeWitt’s challenge to the order striking portions of the first amended complaint also fails on the merits. “[T]he relevant question” under section 17529.5 is “whether [defendants] advertised in [the additional] e-mails.” (*Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, 835.) Here, the answer is no. The first amended complaint alleged the additional e-mails did not “specifically or expressly advertis[e] the Defendants” and in opposition to the motion to strike, DeWitt conceded the additional e-mails did not advertise defendants’ products or services. Under these circumstances, section 17529.5 does not impose liability on defendants for the additional e-mails. We conclude the conclusory allegations in paragraphs 17 through 19 of the first amended complaint were “substantively defective” and the court did not err by granting defendants’ motion to strike. (*PH II, supra*, 33 Cal.App.4th at p. 1682.)

II.

We Reject DeWitt's Claim Regarding Discovery Sanctions

DeWitt claims the court erred by ordering him to pay defendants' attorney fees as a sanction for his discovery misconduct. According to DeWitt, various unspecified "discovery statutes" violate principles of due process and equal protection because self-represented litigants cannot recover attorney fees as discovery sanctions. DeWitt's failure to identify the statutes purportedly violating the rights of self-represented litigants precludes review of his claim. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007.) DeWitt's effort to articulate a challenge to the imposition of discovery sanctions on federal constitutional grounds fails; neither case upon which DeWitt relies supports his claim.

III.

The Court Properly Granted Summary Judgment for Defendants

DeWitt's final claim is the court erred by granting summary judgment for defendants. We review the order granting the motion de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Summary judgment is appropriate if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "[W]e independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

A. Defendants Did Not Violate Section 17529.5, Subdivision (a)(2)

Section 17529.5, subdivision (a)(2) "makes it "unlawful . . . to advertise in a commercial e-mail advertisement" that "contains or is accompanied by *falsified, misrepresented, or forged header information.*"'" (*Rosolowski, supra*, 230 Cal.App.4th at p. 1412, quoting *Kleffman, supra*, 49 Cal.4th at pp. 339-340.) DeWitt contends defendants violated section 17529.5, subdivision (a)(2) because the e-mail headers contained "domain names that were not readily traceable by ordinary consumer recipients."

He is wrong. “[H]eader information in a commercial e-mail is falsified or misrepresented for purposes of section 17529.5(a)(2) when it uses a sender domain name that *neither* identifies the actual sender on its face *nor* is readily traceable to the sender using a publicly available online database such as WHOIS.”⁴ (*Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1101, fn. omitted (*Balsam*).) Here, DeWitt conceded the e-mail headers identified defendants, and admitted he did not need to open the e-mails to determine what entity was advertised. As a result, the e-mail headers “identifie[d] the actual sender” and did not violate section 17529.5, subdivision (a)(2). (*Balsam, supra*, 203 Cal.App.4th at p. 1101.) This is not — as DeWitt seems to suggest — a situation like the one in *Balsam*, where a division of this court held certain header information was falsified or misrepresented because it contained “multiple, randomly chosen, nonsensically named” and “made-up” domain names “to create a misleading impression the e-mails were from different sources when they were in fact all from a single source.” (*Id.* at p. 1097.)

The trial court concluded defendants did not violate section 17529.5, subdivision (a)(2) because the e-mails contained “truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.” DeWitt challenges this conclusion, claiming defendants failed to show they “specifically authorized the placement of their brand names” in the e-mail headers. This argument defies logic and common sense. The complaint alleged defendants authorized third parties to send the e-mails, and that the third parties were defendants’ agents. In opposition to summary judgment, DeWitt conceded defendants authorized the third parties to send the e-mails. “[A] party seeking . . . summary judgment under these circumstances can rely on admissions of material fact made in the *opposing* party’s pleadings.” (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1211.) We reject DeWitt’s argument

⁴ “WHOIS ‘is a publically available online database through which users can access information regarding domains, including the registrant’s name, address, phone number, and e-mail address. [Citation.] WHOIS data is compiled by registrars from information submitted by registrants.’ [Citation.]” (*Rosolowski, supra*, 230 Cal.App.4th at p. 1407, fn. 3.)

that defendants failed to demonstrate they authorized third parties to advertise on their behalf.

B. Defendants Did Not Violate Section 17529.5, Subdivision (a)(3)

The court concluded defendants did not violate section 17529.5, subdivision (a)(3), which prohibits email subject lines “that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.” DeWitt does not challenge this conclusion on appeal. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 [issues not raised in appellate briefs are forfeited or abandoned].)

We conclude the court properly granted defendants’ summary judgment motion. Having reached this result, we need not address the parties’ remaining arguments.

DISPOSITION

The judgment is affirmed. Defendants shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Jones, P. J.

We concur:

Simons, J.

Needham, J.

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